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Supreme Court, U.S.
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No. 99-474

IN THE
Supreme Court of the United States

ANDREW S. NATSIOS, Secretary of Administration and Finance of the Commonwealth of Massachusetts, and PHILMORE ANDERSON, III, State Purchasing Agent,

Petitioners,

v.

NATIONAL FOREIGN TRADE COUNCIL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

MEMORANDUM FOR RESPONDENT NATIONAL FOREIGN TRADE COUNCIL

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QUESTIONS PRESENTED

1. Whether the First Circuit correctly held that the Massachusetts Burma Law, Mass. Gen. Laws. ch. 7, §§ 22G-22M — which was undisputedly enacted to condemn the Nation of Myanmar and influence the conduct of its government — unconstitutionally infringes upon the federal government's exclusive authority to regulate foreign affairs.

2. Whether the Massachusetts Burma Law, which discriminates against foreign commerce, violates the "speak-with-one-voice" principle, and seeks to regulate extraterritorial activity in a foreign nation, violates the Foreign Commerce Clause.

3. Whether the Massachusetts Burma Law, which upsets the delicate balance established by federal Myanmar sanctions, is preempted by federal law.

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MEMORANDUM OF THE NATIONAL FOREIGN TRADE COUNCIL

Respondent The National Foreign Trade Council ("NFTC") hereby responds to the Petition for a Writ of Certiorari ("Pet.") filed by Petitioners Andrew S. Natsios and Philmore Anderson, III (collectively, "the Commonwealth").[1]

STATEMENT

As the petition correctly states, "The Massachusetts Burma Law effectively requires state agencies to increase by 10 percent the price of offers to sell goods and services to the Commonwealth submitted by companies that do business with Burma," a country now known as Myanmar. Pet. 6 (citing Mass. Gen. Laws ch. 7, § 22H(d)). "Doing business with Burma" is defined expansively by the Massachusetts Burma Law, as (1) having any place of business, lease, franchise or distribution agreement in Burma; (2) being the majority-owned subsidiary, licensee or franchisee of a company that has such contacts with Burma; (3) providing any goods or services, including financial or consulting advice, to the government of Burma; or (4) "promoting the importation or sale of gems, timber, oil, gas, or other related products, commerce in which is largely controlled by the government of Burma." Pet. App. 88a-89a (Mass. Gen. Laws ch. 7, § 22G). Under the Law, petitioners prepare and circulate a restricted purchase list, identifying companies known to do business in Burma. Pet. App. 93a (Mass. Gen. Laws ch. 7, § 22(J)). The "ten-percent bidding penalty [works] . . . an effective exclusion from the bidding process." Pet. App. 57a.

There is no dispute that the Commonwealth's sole purpose in enacting this law was to affect the domestic policies of a foreign nation. The bill's sponsor himself characterized the law as a "foreign policy" initiative whose "identifiable goal" was

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[1] Pursuant to this Court's Rule 29.6, Respondent The National Foreign Trade Council states that it is a nonprofit corporation with no corporate parents, subsidiaries, or affiliates.

"free democratic elections in Burma." Pet. App. 9a. Various Massachusetts senators and representatives described the Burma Law as Massachusetts "engag[ing] in their own little version of foreign policy" (C.A. App. 102-03), "set[ting] up some foreign policy business guidelines" (C.A. App. 110), "dabbl[ing] in foreign affairs" (C.A. App. 112), and "promot[ing] and stand[ing] for civil and human rights" in Burma. C.A. App. 114. The Governor's signing statement likewise characterized the Massachusetts Burma Law as "'mak[ing] a stand for the cause of freedom and democracy around the world.'" Pet. App. 9a. Neither the sponsor of the bill, nor the legislators who debated the bill, nor the Governor who signed it into law, made any mention of any economic benefit to the Commonwealth, its agencies, or its citizens. *See* Pet. App. 10a. The purpose, as Massachusetts conceded below (Pet. App. 9a), was rather "'to apply indirect economic pressure against the Burma regime for reform.'"

The economic impact of the statute has been substantial. As the court below noted (Pet. App. 9a), the law "effectively force[s] businesses to choose between doing business in Burma or with Massachusetts." When Governor Weld signed the Law, he called it "'more than symbolic action'" that would "'affect millions of dollars in state business.'"[2] Each year the Commonwealth and its agencies purchase at least $2 billion worth of supplies and services; the Law covers every purchase with few exceptions. (C.A. App. 87) Foreign trade with Myanmar generates nearly $2.3 billion annually in revenues, including trade in products such as timber, oil and gas. *Id.* Not surprisingly, companies historically have done business with both Massachusetts and Myanmar. *Id.*

The Law's impact is perhaps best measured by the broad scope of the restricted purchase list. When the complaint was

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[2] M. Vaillancourt, *Massachusetts Becomes First State to Boycott Burma Business*, Boston Globe, June 26, 1996, at 27.

filed, the list contained 346 companies. C.A. App. 83. Forty-four were United States companies, of which 15 were Fortune 500 companies. *Id.* The total annual revenue of the publicly traded United States companies on the list exceeded $246 billion. *Id.* Many foreign companies with U.S. subsidiaries and affiliates also appeared on the list. *Id.* According to the Law's sponsor, at least 13 companies have exited Myanmar since the Law's passage. C.A. App. 323. NFTC members have chosen to cease doing business in Myanmar to avoid sanctions and have been penalized by Massachusetts for continuing to do business in Myanmar. Pet. App. 10a, 13a.

Shortly after Massachusetts enacted its Burma Law, Congress in 1996 carefully crafted a foreign-relations statute aimed at altering the political conditions in Myanmar. This statute (i) prohibited all but humanitarian assistance to the Myanmar government; (ii) directed the Executive Branch to vote against assistance to Myanmar in international financial institutions; and (iii) barred Myanmar officials from entering the United States. *See* Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 570, 110 Stat. 3009-166. The mandated sanctions did not include trade sanctions, but Congress authorized the President to impose trade sanctions if warranted. Additionally, Congress directed the President to develop a multilateral strategy for pressuring the Myanmar government to change its ways, and allowed him to restrict only "new investment" in "development of resources" in Myanmar, and not contracts for goods, services, or technology. *Id.* §§ 570(b), (c), (f). The President also was authorized to waive sanctions if "he determines and certifies to Congress that the application of such sanction would be contrary to the national security interests of the United States." *Id.* § 570(e) (Pet. App. 12a).

In May 1997, President Clinton endorsed Congress's approach and exercised the congressionally delegated authority to impose trade sanctions, consistent with the limitations set

forth by Congress. *See* President's Message to Congress Transmitting Executive Order No. 13,047 (May 20, 1997); Exec. Order No. 13,047, 62 Fed. Reg. 28,301 (1997). Unlike the Massachusetts Burma Law, the federal sanctions do not penalize companies for doing business in or with Myanmar unless new investment is involved, and they do not apply at all to foreign companies. The purpose of the federal law and executive order, as evidenced by their structure and history, was to pursue a carefully crafted balance between too-harsh sanctions, which would eliminate the possibility of further influencing the Myanmar regime, and too-lenient sanctions that would be ineffective.[3] Neither the federal statute itself nor the implementing executive order in any way suggested that separate state or municipal action was desirable or appropriate in this area.

Following enactment of the Massachusetts Burma Law, at least sixteen other jurisdictions have enacted similar ordinances and resolutions,[4] and at least six others have rejected or

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[3] *See* A.P. Larson, *State and Local Sanctions: Remarks to the Council of State Governments* (Dec. 8, 1998) at 3-4 ("These measures reflect a considered federal government decision not to impose much more rigorous economic sanctions and thereby to maintain some level of economic engagement with Burma in order to further our foreign policy objectives there."); S.1092, 104th Cong., 1st Sess. (1995) (Congress rejected an amendment that would have prohibited all United States investment in Myanmar); 142 Cong. Rec. S8746 (daily ed. July 25, 1996) (Senator Cohen opposed mandatory sanctions because such sanctions would "relinquish all of [the United States'] . . . remaining leverage in Burma . . . [and] further bind the hands of this and any future administrations, taking away those tools of diplomacy — incentives . . . which are crucial").

[4] *See, e.g.*, Alameda Cty., Cal., Admin. Code, Title 4, ch. 4.32 (1999); Alameda Cty., Cal., Admin. Code, Title 4, ch. 4.36 (1999); Amherst, Mass., Annual Town Mtg. Art. 43 (May 14, 1997); Berkeley, Cal., Res. No. 59-853-N.S. (Jan. 12, 1999); Brookline, Mass., Res. Spec. Town Mtg. (Nov. 4, 1997); Cambridge, Mass., City Council Res. (July 27, 1998);

declined to enact such legislation, in part out of concern that the proposed legislation was an inappropriate and unconstitutional effort to make foreign policy.[5]

Several foreign nations have expressed objections to the Burma Law. Pet. App. 10a. The Association of South East Asian Nations ("ASEAN") and Japan have expressed serious concerns to the federal government regarding the Massachusetts Law. C.A. App. 328-29; C.A. App. 330-32. In 1997, the EU and Japan each lodged complaints with the World Trade Organization ("WTO"), condemning the law as a violation of the United States' international obligations. C.A. App. 169; C.A. App. 167-68.

On April 30, 1998, the NFTC filed suit against the Commonwealth officials charged with administering and enforcing this law, seeking a declaratory judgment that the Massachusetts Burma Law was unconstitutional, as well as a permanent injunction barring its enforcement. C.A. App. 10-28. The NFTC's claim was supported by several briefs *amicus curiae*, including briefs filed by the European Union and its

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Chapel Hill, N.C., Res. 97-1-13/R-16 (Jan. 13, 1997); Los Angeles, Cal., Admin. Code, Ord. No. 138,300 div. 10, art. 12 (1999); New York, N.Y., Local Law No. 33 (May 30, 1997); Newton, Mass., Ord. V-146 (Nov. 3, 1997); Palo Alto, Cal., Res. 7715 (Oct. 20, 1997); Portland, Or., Res. 35710 (July 8, 1998); Quincy, Mass., Municipal Code, Title 2, Ch. 2.48 (1997); Santa Cruz, Cal., Res. NS-23,401 (July 8, 1997); Somerville, Mass., Ord. No. 1998-1, § 2-386 (Feb. 1998); Takoma Park, Md., Ord. 1996-33 (Oct. 1996); West Hollywood, Cal., Municipal Code, Sec. 2701 (1998).

[5] *See, e.g.*, Cal. A.B. 888, 1997-98 Regular Sess. (Cal. 1998); Conn. H.R. 6354, Jan. Sess. 1997 (Conn. 1997); S.354 1998 Regular Sess. (Md. 1998); N.C. S.1054, 1997 Sess. (N.C. 1997); N.Y. A.B. 9147, 1998 Sess. (N.Y. 1998); S.984, Jan. Sess. 1997 (R.I. 1997).

Member Countries and organizations representing American business.[6]

The parties entered into a lengthy stipulation of facts. On cross-motions for summary judgment, both sides agreed that there was no factual dispute, including no dispute concerning the deplorable human rights situation in Burma. After briefing and oral argument, the district court held that the NFTC had standing and that the Massachusetts Burma Law unconstitutionally interfered with the federal government's exclusive authority to conduct foreign affairs. The court permanently enjoined the enforcement of that law. Pet. App. 81a. The district court did not decide whether the Massachusetts statute also violated the Foreign Commerce Clause or was preempted by federal law, though it expressed doubt as to the preemption claim. Pet.App. 85a-86a.

On the Commonwealth's appeal, the First Circuit affirmed in a lengthy and thorough opinion, holding that the Massachusetts Burma Law was invalid on all three grounds urged by the NFTC: The Law interfered with the federal government's exclusive power to conduct foreign affairs; it violated the Foreign Commerce Clause; and it was preempted by the federal government's different, and narrower, sanctions directed at the Nation of Myanmar. Pet. App. 1a-73a.

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[6] On appeal, the NFTC received *amicus curiae* support from the European Union and its Member Countries, organizations representing American business, foreign government officials and Members of Congress. Pet. App. 2a-5a. Massachusetts, in turn, was supported by other states and municipalities, claiming the right to enact and enforce their own sanctions legislation, by other Members of Congress, and by various human rights organizations supporting the Commonwealth's efforts to impose sanctions on the Myanmar government. Pet. App. 2a-4a.

ARGUMENT

I. THE DECISION BELOW WAS CORRECT AND DOES NOT CREATE A CONFLICT

The petition presents four questions for this Court's review. Each was decided correctly by the First Circuit, and none presents a conflict with any other decision of this Court, any other court of appeals, or any state supreme court.

A. The Court Of Appeals Correctly Held That The Massachusetts Burma Law Interferes With The Federal Government's Exclusive Authority To Conduct Foreign Policy; There Is No Conflict

1. The Decision Below Is Consistent With This Court's Decision in *Zschernig v. Miller* and All Other Lower Court Decisions

The decision below is mandated by this Court's decision in *Zschernig v. Miller*, 389 U.S. 429 (1968), that state and municipal laws that have more than an "incidental or indirect effect in foreign countries" (*id.* at 432), or that have "great potential for disruption or embarrassment" of United States foreign policy (*id.* at 434), cannot survive. *Zschernig* involved an Oregon probate law that conditioned the inheritance rights of nonresident aliens upon the alien's ability to demonstrate that his country of origin would grant reciprocal rights to a United States citizen, and would not confiscate any of the inherited property. *Id.* at 430-31. Judges under the law searched "for the 'democracy quotient' of a foreign regime," thus intruding impermissibly into "matters which the Constitution entrusts solely to the Federal Government." *Id.* at 435-36. The Oregon law was held to impermissibly intrude into the national government's conduct of foreign affairs.

The foreign-affairs issue presented here has also been considered by a number of lower courts, which have uniformly held that state and municipal efforts to engage in foreign policy

and to impose sanctions in order to influence activities by foreign countries are unconstitutional under this Court's decision in *Zschernig v. Miller*. *See, e.g.*, *Springfield Rare Coin Galleries, Inc. v. Johnson*, 503 N.E.2d 300 (Ill. 1986) (striking down state sales-tax provision exempting all rare coins except South African Krugerrands); *Tayyari v. New Mexico State University*, 495 F. Supp. 1365 (D. N.M. 1980) (invalidating University policy excluding Iranian students until the return of American hostages); *New York Times Co. v. New York Comm'n on Human Rights*, 393 N.Y.S.2d 312, 317 (N.Y. 1977) (concluding that efforts to apply local anti-discrimination laws to prohibit a newspaper from running ads for employment in South Africa "would impair the effective exercise of the Nation's foreign policy").

The only possible exception to this uniform pattern is the decision of the Maryland Court of Appeals upholding a Baltimore ordinance requiring city pension funds to divest themselves of stocks and bonds of companies doing business in South Africa over a period of two years. *Board of Trustees of Employees' Retirement Sys. v. Mayor and City Council of Baltimore City*, 562 A.2d 720 (Md. 1989), *cert. denied*, 493 U.S. 1093 (1990). While the NFTC believes that the *Board of Trustees* case was not correctly decided, the ordinance at issue there was different in scope and effect from the Massachusetts Burma Law: it did not regulate state purchases of goods and services, was not designed to directly influence the conduct of South Africa, and was found to have only a "minimal" effect. *Id.* at 734. Indeed, the court expressly upheld the statute only because of its lack of consequences. As the court there noted, (1) divestment alone would not cause companies to pull out of South Africa; (2) the ordinances provided for gradual divestment to ensure minimal impact; and (3) the ordinance applied "only to investments in companies doing a significant amount of business in South Africa." *Id.* at 747. No claim is made here, and none could be made, that the Massachusetts statute is devoid of practical consequences.

2. *Zschernig* Was Correctly Decided

Nonetheless, the Commonwealth urges (Pet. 16-23) that the First Circuit erred by holding that the Massachusetts Burma Law unconstitutionally impedes the federal government's exclusive authority to conduct foreign affairs. Unable to point to any conflicting decision, the Commonwealth effectively urges that *Zschernig v. Miller* was decided incorrectly. There is no basis for this claim.

Placing exclusive power over foreign affairs in the national government was one of the central purposes of the Constitution, for the "major drive wheel in the movement for constitutional reform" was the confused state of foreign affairs under the Articles of Confederation. F. Marks, *Independence on Trial: Foreign Affairs and the Making of the Constitution* 50 (1973). Prior to the Constitution, under the Articles of Confederation, individual states caused at least two major foreign-policy embarrassments by conducting their own foreign relations. In one, several states refused to comply with the British peace treaty; in another, when Britain refused to open the West Indies to American trade, retaliation through sanctions was rendered impossible by the different approaches of the individual states, each of which was empowered to make its own foreign policy. *See* J. Rakove, *Making Foreign Policy — The View From 1787*, in *Foreign Policy and the Constitution* 1, 2 (Goldwin & Licht, eds., 1990). This multitude of foreign-policy voices left foreign governments uncertain about who, exactly, they would be required to negotiate with in the United States; consequently, those governments "regarded the United States as unreliable." Levy, *Federalism and Collective Action*, 45 U. Kan. L. Rev. 1241, 1254 (1997).

It is beyond debate that, under the resulting Constitution, responsibility for conducting foreign relations rested exclusively in the hands of the federal government. Madison, writing in *The Federalist*, urged the importance of placing centralized and

exclusive national authority over foreign relations with the federal government: "If we are to be one nation in any respect, it clearly ought to be in respect to other nations." *The Federalist No. 42* (J. Madison). *See also The Federalist No. 80* (A. Hamilton). From the framing onward, this Court has similarly recognized that the Constitution requires a national government with a strong and exclusive voice when it comes to dealings with other nations: A long and unbroken line of cases from this Court holds that "[p]ower over external affairs is not shared by the States; it is vested in the national government exclusively." *United States v. Pink*, 315 U.S. 203, 233 (1942). *See also Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) ("our system of government . . . imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference"); *United States v. Belmont*, 301 U.S. 324, 331 (1937); *Board of Trustees of Univ. of Ill. v. United States*, 289 U.S. 48, 59 (1933); *Chae Chan Ping v. United States* (the Chinese Exclusion Case), 130 U.S. 581, 606 (1889); *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 575 (1840).

This exclusive federal control necessarily constrains the states. In *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), this Court held that "rules of international law" such as the "act of state" doctrine could not "be left to divergent and perhaps parochial state interpretations." *Id.* at 425. The act-of-state doctrine "must be treated exclusively as an aspect of federal law," else it be "effectively undermined." *Id.* at 424-25. Five years later, as noted above, this Court in *Zschernig* held that the exclusive federal authority to regulate foreign relations requires that state or municipal laws with more than an "'incidental or indirect effect in foreign countries,'" or that have "great potential for disruption or embarrassment" of United States foreign policy, cannot survive. *Zschernig v. Miller*, 389 U.S. at 432, 434.

Nor does the Tenth Amendment allow states to engage in foreign policymaking. The Tenth Amendment only reserves to the states those "powers not delegated to the Federal Government nor prohibited to the States." *Alden v. Maine*, 119 S. Ct. 2240, 2259 (1999). The conduct of foreign relations, of course, has long been "delegated to the Federal Government" exclusively; it "is not shared by the States." *United States v. Pink*, 315 U.S. at 233. *See* p. 10 *supra*. The Common-wealth does not suggest otherwise.

As the Framers recognized, exclusive federal control is the only sensible approach. If one state could adopt its own foreign policy, all states would suffer the consequences. Some would be political. Some would be economic. Fifty different foreign-trade policies would create significantly higher barriers to trade generally. The increased costs and uncertainty created by such a regime would be felt by every state. Additionally, many of these individually crafted policies would inevitably conflict (*e.g.*, one state might favor trade with a particular country; other states might oppose such trade on non-economic policy grounds — *e.g.*, human-rights violations). And if states can make foreign policies, so can thousands of municipalities, which exponentially increases the potential for conflict and disruption. As the Court of Appeals recognized, "the conduct of this nation's foreign affairs cannot be effectively managed on behalf of all of the nation's citizens if each of the many state and local governments pursues its own foreign policy." Pet. App. 73a.

3. *Barclays* Does Not Undermine *Zschernig*

The Commonwealth claims, however, that this Court's decision in *Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. 298 (1994), undermines *Zschernig*. As the Court of Appeals noted (Pet. App. 35a), "there is simply no indication, in *Barclays* or in any other post-*Zschernig* case that *Zschernig* is not good law."

Barclays did not purport to alter *Zschernig*. Indeed, there is no mention of *Zschernig* in *Barclays*, even though the parties and the United States cited *Zschernig* in their briefs and argument to this Court. Had this Court meant to "undercut" *Zschernig* in *Barclays*, it had every opportunity to do so, but it did not. *Barclays* involved applying the Foreign Commerce Clause's "speak with one voice" component to a neutral state-tax statute that did not "target[] any foreign nation or nations." Pet. App. 35a. There is no basis for applying that reasoning in a case that involves a different aspect of the constitution (the exclusive foreign-affairs power) and a state law with an avowed goal of conducting foreign policy with respect to a particular country. Pet. App. 35a. In any event, as the Court of Appeals correctly noted, even if *Barclays* had any application beyond the Foreign Commerce Clause, there would be no basis for interpreting Congress's failure to explicitly preempt the Massachusetts Burma Law as implied acquiescence in Massachusetts' efforts. Pet. App. 63a.

4. There Is No Market-Participant Exception In the Foreign Relations Area

The Commonwealth's assertion (Pet. 26-27) that the "market-participant exception" applies to the federal foreign relations power as well as to the Foreign Commerce Clause likewise is unfounded. There is no basis for extending the "market-participant exception" from the dormant Interstate Commerce Clause, where the primary concern is economic parochialism, to the foreign-affairs arena, where overall national relations with foreign nations are at stake. As the court below noted (Pet. App. 36a), no court has ever done so. No court has even suggested that there is a plausible argument for doing so. And this Court has rejected at least one other similar attempt to engraft the "market-participant exception" onto another constitutional provision. *United Bldg. & Constr. Trades Council v. Mayor & Council of Camden*, 465 U.S. 208, 219-20 (1984) (rejecting the "distinction . . . between market

participant and . . . market regulator" under the Privileges and Immunities Clause, since "[t]he two Clauses have different aims and set different standards for state conduct").

Additionally, for the reasons set forth in Section I(B) below, even if there were such an exception, the First Circuit correctly held that there is no basis for applying a "market-participant exception" in this case, since the Massachusetts Burma Law is plainly a regulatory measure and not a proprietary one (the latter being the only sort of measure to which a "market-participant exception" could conceivably apply).

The First Circuit's foreign-relations ruling was correct and presents no conflict.

B. The Court of Appeals' Holding That The Massachusetts Burma Law Violates The Foreign Commerce Clause Was Correct And Creates No Conflict

Apart from its market-participant argument, the Commonwealth does not take issue with the Court of Appeals' holding that the Massachusetts Burma Law violates the Foreign Commerce Clause in three different respects: (i) by discriminating against foreign commerce; (ii) by impeding the federal government's ability to speak with one voice in foreign affairs; and (iii) by attempting to regulate extraterritorially, outside the Commonwealth's borders. Pet. App. 52a-57a. The decision below in these respects is consistent with — indeed, compelled by — numerous decisions of this Court. The Commonwealth urges (Pet. 25-27) only that the Court should hold that the Burma Law is protected by a supposed "market-participant exception" to the Foreign Commerce Clause.

To be sure, this Court has previously declined to reach the issue of whether the "market-participant exception" should apply to the Foreign Commerce Clause, and if so, whether it would have the same contours as the "market-participant

exception" to the dormant Interstate Commerce Clause. *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 n.9 (1980).[7] But the Court of Appeals did not rest its Commerce Clause holding on the inapplicability of the market-participant exception under the Foreign Commerce Clause; rather, it merely expressed its "skeptic[ism]" toward the Commonwealth's claim, which it viewed as "unlikely." Pet. App. 48a. The Court of Appeals noted that "the issues are complex and we choose to leave their resolution to another day and another case" (Pet. App. 50a), but nonetheless "assume[d] arguendo that there is a market participant exception under the Foreign Commerce Clause." Pet. App. 42a. Proceeding from that assumption, the First Circuit held that Massachusetts was not in fact acting as a market participant, but as a market *regulator*, because the Commonwealth was "regulat[ing] activity outside Massachusetts that is not related to the seller's interactions with Massachusetts." Pet. App. 46a.

This decision was not only correct, but was required under this Court's decision in *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984), and other cases. In *South-Central Timber*, the Court made it clear that a state cannot avoid Commerce Clause restrictions by incorporating what are essentially regulatory provisions into contract terms and then arguing that it is simply participating in a market. In invalidating an Alaska statute requiring all timber sold from certain state-owned land to be processed in Alaska (*id.* at 84-

[7] This Court has confirmed that "the Founders intended the scope of the foreign commerce power to be . . . greater" than the interstate commerce power granted to the federal government, *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1979); thus, "Commerce Clause scrutiny may well be more rigorous when a restraint on foreign commerce is alleged." *Reeves*, 447 U.S. at 437-38 n.9. *See also South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 92 n. 7 (1984). Only one lower court decision has ever suggested that there is such an exception under the Foreign Commerce Clause. *See* Pet. App. 36a-37a n.16.

85), the plurality opinion explained that "the [market-participant] doctrine is not *carte blanche* to impose any conditions that the State has the economic power to dictate, and does not validate any requirement merely because the State imposes it upon someone with whom it is in contractual privity." *Id.* at 97. *See Wisconsin Department of Industry, Labor and Human Relations v. Gould, Inc.*, 475 U.S. 282, 289-91 (1986); *Building & Construction Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 229 (1993).

Accordingly, the Court below stated:

> Massachusetts's action here is akin to prohibiting purchases from companies that do business in states that have policies with which Massachusetts disagrees. This would plainly be unconstitutional under the domestic Commerce Clause. Massachusetts surely cannot do the same in the international context, as state actions that affect international commerce receive even greater scrutiny than do actions that affect interstate commerce.

Pet. App. 48a. That holding was clearly correct, and is not even alleged to create a conflict.

C. The Court of Appeals' Holding That The Massachusetts Burma Law Is Preempted By Federal Sanctions Against Burma Was Correct And Creates No Conflict

Finally, the Commonwealth accuses the First Circuit of "invert[ing] the presumption against preemption long applied by this Court" (Pet. 28) by holding that when "Congress legislates in an area of foreign relations, there is a strong presumption that it intended to preempt the field, in particular where the federal legislation does not touch on a traditional area of state concern." Pet. App. 69-70a (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

The Court of Appeals' decision creates no conflict on the preemption issue. The Commonwealth identifies none; indeed, its petition urges this Court only that "[t]his error should be reviewed by this Court." Pet. 28. Even so, there was no "error" in the Court of Appeals' preemption ruling: It is well settled that where a state law implicates the national government's foreign-affairs powers, "[t]he conflict with federal policy need not be as sharp as that which must exist for ordinary pre-emption when Congress legislates in a field which the States have traditionally occupied." *Boyle v. United Technologies Corp.*, 487 U.S. 500, 507 (1988) (quotation omitted). Likewise, a legion of post-*Hines* cases cited by the Court of Appeals hold that an "'Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" Pet. App. 66a (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978); *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). *See also Hillsborough County v. Automated Med. Lab., Inc.*, 471 U.S. 707, 713 (1985); *Pennsylvania v. Nelson*, 350 U.S. 497, 504 (1956).

State laws touching the field of foreign relations, such as the Massachusetts Burma Law, are fundamental examples of laws that "the federal system will be assumed to preclude," since the conduct of foreign affairs is a core and exclusive power of the national government. *See* Section I(A) above. The Commonwealth's effort to recast the Burma Law as one "governing purchasing decisions" and not foreign affairs (Pet. 29) simply "ignores the fact that its law, like the federal sanctions against Burma, is aimed primarily at effecting change in and expressing disapproval of the current regime in Burma." Pet. App. 67a.

Even if the Massachusetts Law were presumed valid, it would still be preempted. As the Court of Appeals noted (Pet. App. 70a), "Massachusetts's Law veers from the carefully balanced path that Congress has constructed" in five different respects:

(1) The Massachusetts Burma Law "applies to virtually all investment in Burma," while the federal sanctions "limit only new investment in the 'development of resources'" (Pet. App. 70a);

(2) The Massachusetts Burma Law permits no trade with Burma, while "[t]he Federal Burma Law permits some trade with Burma" (Pet. App. 70a-71a);

(3) The Massachusetts Burma Law "applies to parties, including foreign companies, not covered by the federal law" (Pet. App. 71a);

(4) The Massachusetts Burma Law has no termination conditions or provision; while "the federal law provides for sanctions to be terminated upon a finding by the President that human rights conditions in Burma have improved" (Pet. App. 71a); and

(5) "Massachusetts's unilateral strategy toward Burma directly contradicts the federal law's encouragement of a multilateral strategy." Pet. App. 71a.

These five findings remain unchallenged by the Commonwealth.

Where Congress has struck such a delicate balance, state legislation that disrupts it is preempted. For example, in *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88 (1992), state licensing acts designed to supplement the federal OSHA standards were preempted. The Court held that states

may not "selectively . . . 'supplement' certain federal regulations with ostensibly nonconflicting standards." *Id.* at 103. The Commonwealth may not "selectively supplement" the federal Burma legislation with its own state sanctions.

The First Circuit's preemption ruling was clearly correct, and creates no conflict.

II. IF THIS COURT BELIEVES THAT THE ISSUES ARE UNSETTLED, CERTIORARI SHOULD BE GRANTED

While the questions presented have not been previously decided by this Court on these facts, the applicable legal principles are well settled and were carefully and correctly applied by the First Circuit. Neither the Commonwealth's spurious claims of conflict nor any asserted "glamour and emotion" of the case (*Singleton v. Commissioner*, 439 U.S. 940, 942 (1978) (Blackmun, J., dissenting from denial of certiorari)) should lead this Court to grant certiorari. Nor should this Court assume that the decision below will invalidate country-neutral state and municipal laws barring purchases of goods produced by unfair labor or unsound environmental practices. However, should this Court entertain doubts as to whether the issues have indeed been settled by previous decisions of this Court, the NFTC believes that this would be an appropriate case, and an appropriate time, to consider the issues. This is so for two reasons.

First, as the Commonwealth describes in its Petition (at 13), a significant number of jurisdictions in addition to Massachusetts have adopted their own selective purchasing laws in an effort to coerce change in Myanmar (Burma) as well as other countries.[8] The NFTC believes that these other

[8] *See* Pet. App. 10a; *see also*, p. 4 n.4, *supra*.

jurisdictions should abide by the decision of the First Circuit,[9] particularly in view of its multiple grounds for invalidating the Massachusetts Law. If certiorari is denied, business organizations will appropriately make long-term investment and contractual decisions based on the assumed invalidity of these laws. It would be highly disruptive to effective international trade if some years in the future the Court were to upset these expectations and hold that such laws are constitutional.

Second, if this Court were to conclude that these issues require consideration and resolution, this case would present an appropriate vehicle for doing so. The standing of the plaintiffs is now undisputed and indisputable; the Massachusetts law is clear and representative of those in other jurisdictions; there is a complete absence of factual disputes; and the treatment of these issues by the lower courts is both extensive and thorough. There would be little to be gained by allowing these issues to percolate further in the lower federal courts. If this Court is ever to consider the issue, the interests of all concerned — the business community, the affected jurisdictions and the public at large — are served by avoiding delay in that consideration.

[9] *See, e.g., Portland 76 Auto/Truck Plaza, Inc. v. Union Oil Co.*, 153 F.3d 938, 943 (9th Cir. 1998) ("Because of the importance of predictability to commercial relations, as well as deference to our sister circuits, we shall not lightly create an intercircuit conflict affecting commerce nationally."), *cert. denied*, 119 S. Ct. 1454 (1999); *Washington Energy Co. v. United States*, 94 F.3d 1557, 1561 (Fed. Cir. 1996) ("[w]e thus temper the independence of the analysis in which we engage by according great weight to the decisions of the other circuits on the same question").

CONCLUSION

If this Court believes that the issues are unsettled, certiorari should be granted. Otherwise, certiorari should be denied.

Respectfully submitted,

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